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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

RALEIGH PORTER,

Petitioner,

v. No.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

/jaf

QUESTION PRESENTED

Where the jury recommends a sentence of life imprisonment, does the imposition of a death sentence violate the constitutional guarantee against double jeopardy, deprive the condemned person of due process of law, or subject him to cruel and unusual punishment?

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OPINION BELOW

The opinion of the Florida Supreme Court is reported at 429 So.2d 293 (Fla. 1983).

JURISDICTION

The Supreme Court of Florida issued the opinion and judgment in this case on January 27, 1983 (A1-6). The Supreme Court of Florida denied Petitioner's timely motion for rehearing on April 28, 1983 (A7). Title 28 United States Code, Section 1257(3), and Rule 17 of the United States Supreme Court Rules confer jurisdiction upon this Court to review the judgment in question. Petitioner asserted below and is asserting here the deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States are involved.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

REASONS FOR DENYING THE WRIT

Relying on Bullington v. Missouri, 451 U.S. 430, 68 L.Ed.2d 270 (1981), Petitioner urges this Court to grant certiorari review on his claim that imposition of a death sentence following a jury's recommendation of life imprisonment violates the prohibition against double jeopardy, deprives him of due process of law, and constitutes cruel and unusual punishment. The contentions are without merit.

This Court has rejected such a claim by previously upholding Florida's death penalty statute knowing that Florida's statutory scheme called for the jury to recommend either life imprisonment or death. Proffitt v. Florida, 428 U.S. 242, 249; 49 L.Ed.2d 913, at 921 (1976); see also Dobbert v. Florida, 432 U.S. 282, at 287, 53 L.Ed.2d 344, at 353 (1977). As stated in Proffitt

> "The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function. Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15, 20 L.Ed.2d 776, 88 S.Ct. 1770, 46 Ohio Ops. 2d 368 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."
>
> (49 L.Ed.2d at 922-923)

In Florida, the jury provides only an advisory recommendation to the trial court, as the sentencer. State v. Dixon, 283 So.2d 1 (Fla. 1973); Cochran v. State, 393 So.2d 17 (Fla. 1981).

Missouri, the jury is the sentencer and in Bullington v. Missouri, the jury had sentenced the accused to life imprisonment in his first trial. Upon retrial, a second jury imposed death. The sentencing proceeding was characterized by this Court as "a trial on the issue of punishment", 68 L.Ed.2d at 279. Florida, unlike Missouri, does not explicitly require the jury to determine whether the prosecution has proved its case at sentencing. Since, in Florida, there has been no acquittal at the sentencing phase — the sentencer (trial judge) only imposed a sentence of death — the double jeopardy question presented by Bullington is not presented sub judice.

CONCLUSION

The petition for writ of certiorari should be denied as no substantial federal question is presented and petitioner's argument implicitly has been rejected previously by this Court with the affirmances in Proffitt, supra, and Dobbert.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Robert J. Landry

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Regular Mail to: Paul C. Helm, Esquire, Assistant Public Defender, Hall of Justice Building, 453 North Broadway Avenue, Bartow, Florida 33830-3798 this 28th day of June, 1983.

Robert J. Landry
Of Counsel for Respondent